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Comparative Law and the 'Proceduralization' of Constitution-Building Processes

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I. *Introduction*

In the contemporary world, state and/or nation-building is increasingly substituted by constitution-building. Whereas previous centuries have been the time of the states and of the nations, this is the era of the constitution. When based on the rule of law, state and nation exist only through the constitution, and only the constitution is the reference point for the (re-)establishment of a nation. In modern liberal democracies, it is the constitution, not the state nor the nation, that establishes and guarantees the unity of a people, as pointed out by Dolf Sternberger in his concept of *Verfassungspatriotismus*.[1] A people is what its constitution is. Therefore, the study of state and nation-building in contemporary democracies (or democracies-in-the-making) is in the first line the study of constitution-building.

The analysis of constitution-building-processes, however, is all but a simple task. For ages, and particularly when state and nation were more important than constitutions, lawyers have basically avoided the problem.[2] Especially in the continental legal tradition, the theory of the *pouvoir constituant* excluded every further attempt to seriously investigate the genesis of constitutions, since it treated the establishment of a constitution as a formal act, created by an unlimited power, which took logical and legal priority over the constitution itself.[3] Therefore, the

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* This essay has been discussed and written together by Andrea Lollini (with the main responsibility for paragraphs III and IV.2) and Francesco Palermo (for paragraphs I, II, IV.1 and V).

[1] D. Sternberger, Verfassungspatriotismus (1990).

[2] Compare O. Pfersmann, *in* Droit constitutionnel 93 (L. Favoreau et al. eds. 2001), who maintains that the constituent power cannot be considered a legal phenomenon. "The elaboration of a constitution does not depend on law, it creates the law".

[3] See in particolar J. E. Sieyes, Exposition raissonnée des droits de l'homme et du citoyen, quoted by G. Burdeau, Traité des Sciences Politiques (vol. IV) 172 (1971). For a comprehensive analysis see Cl. Klein, Théorie et practique du pouvoir constituant (1993). For the distinction between

process of constitutional formation, its (unconceivable) limits, its procedures, its contents, were considered to fall outside of the realm of legal analysis.

Such a comfortable but simplistic approach is put under stress in contemporary constitution-making (i.e. the drafting of a constitution) and constitution-building (i.e. the more general process of establishing and implementing a constitution) and it needs to be revised profoundly. Over the last decades, a clear tendency is emerging towards a fragmentation in the process of constitution-making (and, more broadly, constitution-building). Both in peaceful contexts and in several post-conflict arenas, the (pre-legal) constitution-making *moment* is being substituted by constitution-making *processes* and finally by the establishment of (legally defined) constitution-making *procedures*. As a consequence, the constitution is no longer a mere and single act of political will, but a more complex series of constitutional facts and acts, including political, judicial and international conditionality, and in the end it becomes a legally-driven process and procedure.[4] Contemporary constitutions are thus the outcome of a process of stratification of formal and material legal acts, increasingly supported by comparative elements due to the interplay of actors both internal and external to the domestic arena. Such a process, thus, can no longer be neglected in the legal analysis.

Taking this background as its starting point, this essay develops two main research hypotheses. First, it argues that contemporary constitutionalism is marking the end of the traditional constitution-making approach, where the constitution was seen as a single legal act created by an unlimited political power. The exclusiveness of the political constitution-making is being substituted by a larger variety of constitutional factors, is involving a plurality of actors with different legitimacies, and is diluting the constitution-making moment over a longer period of time. This clearly emerges from the analysis of recent constitution-building processes that have been exaggerating the (return to the) traditional, political-only method of constitution formation (the provocative cases of the EU on the one hand and of Afghanistan and Iraq on the other will be considered later in this chapter). These processes tend to fail when marked by an excess of simplification, which is no longer compatible with today's reality.

Secondly, the paper maintains that comparative law is the procedural matrix of modern constitution-building. In other words, there is no modern constitution-building nor constitution-making without a massive use of comparative (and international) law. This does not (and should not) mean legal transplants from one country to another, but simply that, in an interconnected world, constitutionalism can no longer be but interconnected. The role of comparative (and international) law in constitution-building processes and in the elaboration of constitution-building procedures is thus the litmus test for the end of the age of the *pouvoir constituant* as well as a necessary step in contemporary constitutionalism. Comparative law, of course, is not "law", but a method – at present the most appropriate interpretative method[5] – to understand legal phenomena: it does not, as such, produce law, but it helps understand the new dynamics underpinned by constitution-building processes.

This paper argues that such dynamics are increasingly becoming procedural – thus legal – instead of being merely political, and this trend is demonstrated (and supported) by comparative law, which at the same time provides the common ground for the circulation of the procedural method.

original constituent power and derived constituent power (basically coinciding with the power to amend the constitution) see firstly R. Bonnard, *Les actes constitutionnels de 1940*, Revue du droit public 48 ss (1942).

[4] See La "manutenzione" costituzionale (F. Palermo ed., 2007).

II. *"Comparativization" of constitution-building and the procedural method*

1. *Meaning and scope*

Recent constitution-building processes tend to be exposed to strong international and comparative influence. While the former is not at all a novelty, as shown by an increasing amount of cases in which post-conflict constitutions have been approved under international pressure and have sometimes even been dictated by the international community,[6] attention needs to be paid to the phenomenon that could be labeled as "comparativization" of the constitution-making process.

[5] As correctly pointed out by P. Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat*, JuristenZeitung 913 ss (1989), comparative law should be considered as the fifth methodology for legal interpretation, in addition to the classical four identified by Savigny in the 19th century (literal, systematic, historical and teleological interpretation).

[6] The variety of cases ranges form post-war Germany, Japan and Italy, to – more recently – Namibia, East Timor, Bosnia and Herzegovina and other Balkan countries (not to mention Kosovo), Cambodia, Cyprus, etc. For a comprehensive overview see H. Tourard, L'internationalisation des constitutions nationales (2000), and (shorter) N. Maziau, *Le costituzioni internazionalizzate. Aspetti teorici e tentativi di classificazione*, Diritto pubblico comparato ed europeo (DPCE) 1397 ss (2002-IV). For a tentative classification of the types of interaction between domestic constitutions and international "standards" see D. Maus, *L'influence du droit international contemporain sur l'exercice du pouvoir constituant, in* Le nouveau constitutionnalisme. Mélanges en l'honneur de Gérard Conac 87 ss (J.-C. Colliard & Y. Jégouzo eds., 2001). The Author distinguishes between three possible situations: strong interaction (when domestic law is bound to be in line with international provisions), medium interaction (where mere compatibility of domestic law with international requirements is demanded) and weak or soft interaction (where a process of gradual harmonization is required).

Unlike international law, which is an autonomous branch of law, implemented by international organizations, by the states, and by the international community as a whole, comparative law is not normative, but rather a methodology. "Comparativization" of the constitution-making process means therefore that constitutions of the last wave[7] are adopted under a factual influence of experiences, legal solutions and practices elaborated elsewhere. Comparativization of the constitution-making processes is thus a less visible phenomenon than internationalization, but not less important. On the contrary, it requires contemporary analysts of constitutional developments to be trained in comparative methodology, thus avoiding either a too simplistic understanding of today's constitutionalism, or – even worse – gross mistakes in superficially applying the comparative method, e.g. by suggesting rudimental forms of legal transplants that are deemed to fail, causing bigger problems than those that they are aimed at resolving.[8]

2. *The procedural method in constitution-building*

Comparativization in constitution-building means both that increasing attention is paid to foreign experiences, drawing comparative consequences from the functioning of institutions and from procedures adopted elsewhere, and that foreign institutions, case-law and global tendencies achieve such an authority that makes them a pre-normative factor in the process of adopting a constitution. Apart from the circulation of specific institutional solutions, what seems to be the main consequence of the phenomenon of comparativization of constitution-building is the dissemination of a method. More or less voluntarily, almost all processes of constitutional formation of the last "generation" of constitutions (i.e. those drafted over the last 30 years) have been following a common matrix in adopting constitutions that can be called "the procedural method".

Such a method indicates an overall tendency of the constitutions of the last generation (beginning with the cases of Portugal 1976 and Spain 1978)[9] to be

[7] A convincing classification of constitutional waves (and constitution-making processes) is provided by J. Elster, *Constitutionalism in Eastern Europe. An Introduction*, 58 University of Chicago Law Review 447 ss (1991), who distinguishes between seven clusters or waves of constitutions ranging from the post-revolutionary constitutionalism of the 18th century to contemporary post-cold war transitions.

[8] See on this phenomenon G. Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 American Journal of Comparative Law 93 ss (1995), and G. Ajani, *The Transplant of Vague Notions, in* Liber Amicorum Z. Peteri 17 ss (H. Szilágyi István, Paksy Máté eds., 2005).

[9] In both cases, in fact, constitutional transition towards democracy was carried out through a negotiated political platform involving the former regimes and the new democratic political forces. Portugal and Spain, in other words, can be considered the first examples of multi-phase and procedural transition to a new constitutional order. See e.g. G. de Vergottini, Le origini della seconda repubblica portoghese. 1974–1976 (1977) and Una costituzione democratica per la Spagna (G. de Vergottini ed., 1978). See briefly R. Jiménez Asensio, Apuntes para una historia del constitucionalismo español 173 ss (1992) as well as R. Morodo, La transición política (1984) and Transición política y consolidación democrática. España (1975–1986) (R. Cotarelo ed., 1992).

drafted in a new way, abandoning the (exclusiveness of the) classical, political method of the past. In particular, all recent constitutions have been drafted taking more and more distance of three inherent features of past constitutionalism. First, the elaboration and even the adoption of a constitution is no longer a temporarily unified moment. Constitutional assemblies or their functional equivalents tend to adopt a constitution through a coordinated series of constitutionally relevant moments and acts, making it difficult to clearly determine when the "constitutional big bang" takes place. Second, the exclusive political legitimacy of constitution-givers is being integrated by a number of other actors, representing different stakeholders, interests, categories, forms of legitimacy (e.g. Courts, international organizations, NGOs, experts, pressure groups, and in the end constitutionalism itself).[10] Such an inclusive approach is transforming constitution-making from a political agreement into a more complex – and often slower – process of incorporation of different constitutive elements into a constitution, performing a broader integrative function as compared to the past, where societal integration was delegated exclusively to the political representation, and marks the end of the political myth of exclusiveness of political decision-making. Third, and consequently, the very essence of a procedural approach to constitution-making (and, more broadly, to constitution-building) makes it illusory to believe that a constitution is the product of a free, unlimited constituent power. Not only political, but also international and comparative conditionality is playing an immense role in the process of adopting a constitution.

Thus, instead of the rooted idea of constitution-making as a temporarily unified, political and unrestricted activity, a new practice is being established, based on different – in some cases totally different – mechanisms and approaches, requiring new systematic and comparative tools to be analyzed and fully understood. Such new mechanisms are in the first place a temporally diluted process for the adoption of a constitution, also requiring procedural rules for governing the different stages of constitution-making and therefore constraining constitution-giving into rules on the production of rules.

Second, new constitutions tend to be the result of a process of constitutional stratification, of slow sedimentation of constitutionally relevant acts, facts and judicial decisions, and even the very texts of new constitutions can be the

[10] On these developments see the papers published under the title *Back to Government? The Pluralistic Deficit in the Decision-making Process and Before the Courts*, 12 (2) Indiana Journal of Global Legal Studies 409 ss (2005).

product of a plurality of constituent acts, such as in the case of South Africa and other experiences of poly-phase adoption of constitutions, normally through transitional texts.[11]

Third, even though the rhetoric of constitutional discourse survives, underlying the absolute freedom of constitution-givers in determining the contents of a constitution, all recent constitutional-formation processes and increasingly even the very texts of new constitutions tend to make reference to their embedment into international and comparative standards. By doing so, the constitutions of the present generation show, as a matter of fact, that they are grounded on a double legitimacy: internal and external. The international community and (sometimes vague) comparative standards are being considered as a source of legitimacy in a way that becomes increasingly similar to the internal political process. Recent constitutions are thus also grounded on the acceptance by the international community, by showing that international standards and comparative best practices have been followed. In other words, the basic law elaborated through such a poly-phase and pluralistic constitution-making process has to persuade not only the country's citizens, but also other states and the international community as a whole. Thus, constitution-building, the complex process for the adoption of a constitution and for its penetration into the society, is becoming bi-directional, being addressed to the inside (the national political community and society) as well as to the outside (international and comparative acceptance of the adopted text). If and where peculiar solutions are adopted, there is a sort of a moral obligation to justify them in comparative terms.[12] Moreover, such moral obligation quickly becomes political as international and comparative acceptance is the requirement, for states in transition, to be admitted in the international community and particularly in some international organizations.[13]

An empirical verification of such a profound shift from the classical to the present constitution-making model would require an in-depth analysis of the

[11] Other examples can be found in the cases of Malawi, Namibia, Hungary, etc. See below.

[12] As appeared to happen e.g. when the 'Israeli Basic Law: the Government' was amended in 1992 in order to introduce the popular election of the Prime Minister (a provision that was changed after only one electoral round), as testified in the *travaux préparatoires*. See on this regard H. Stellman, *Electing a Prime Minister and a Parliament: The Israeli Election 1996*, PARLIAMENTARY AFFAIRS 648 ss (1997).

[13] On this phenomenon, regarding the admission to what the author labels "the three geo-juridical areas of Europe" (OSCE, Council of Europe, European Union), see R. Toniatti, *Los derechos del pluralismo cultural en la nueva Europa*, 58 (II) REVISTA VASCA DE ADMINISTRACIÓN PÚBLICA 17 ss. (2000). For the more specific case of the admission to the Council of Europe see J.-F. Flauss, *Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 ss (1994). As regards the accession to the EU see among others C. Pinelli, *Conditionality and Enlargement in Light of EU Constitutional Developments*, 19 EUROPEAN LAW JOURNAL 354 ss (2004).

"comparative supermarket" of models on the one hand, as well as a broad mapping of the case-law produced by the constitutional courts. As to the first aspect, it is self-evident that the comparativization of constitution-building offers a broad spectrum of "comparative shopping" in the huge supermarket of models offered by the foreign best practices, ranging from the classical, post-colonial idea of legal transplants (i.e. importation of successful legal institutes and instruments normally due to a previous colonial domination or to the prestige of foreign solutions) to a more complex and modern idea of foreign law as metabolized through the activity of international bodies or institutions,[14] or through the use of comparative law as a parameter in judicial decisions or in authoritative scholarly pieces. As to the role of courts (particularly constitutional courts) in the constitution-building processes, the increasingly proactive judicial approach that is marking the recent constitution-building processes might also be seen both as a reason and as a product of the comparativization of legal systems.[15] In fact, constitutional courts have recently proved to be particularly attentive to the comparative method[16] and the increasing role of the courts as determinant hermeneutical actors in constitution-making and constitution-building processes[17] has consequently increased the attention paid to comparative achievements. In some cases, such as South Africa, constitutional courts also play a fundamental role – expressly recognized by the rules on the adoption of a constitution – in the very drafting of a constitution, thus explicitly recognizing constitutional adjudication and certification as one of the factors for the legitimacy of the constitution to be adopted. Sometimes, constitutional courts are explicitly vested with the power to initiate the constitution-amending procedure, such as in Ecuador and Panama. In other, more numerous cases, constitutional courts do not play any formal role in the drafting of the constitution, and therefore the judicial use of comparative law is to establish ex-post legitimacy of the constitution vis-à-vis the international community. Constitutional adjudication is therefore one of the key-determinants that prove the growing influence of comparative law as a critical factor of constitution-building and as a process of drafting a constitution and above all of legitimizing it, both internally and externally.

[14] An interesting and particularly effective example is represented by the role played in Europe by the Council of Europe's Commission for Democracy through Law (so-called Venice Commission). See <http://www.venice.coe.int/site/dynamics/N_Subject_ef.asp?T=13&L=E>.

[15] See P. Häberle, *Funktion und Bedeutung der Verfassungsgerichte in vergleichender Perspektive*, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 685 ss (2005).

[16] For a broad overview and several country examples see CORTI NAZIONALI E COMPARAZIONE GIURIDICA (G. F. Ferrari & A. Gambaro eds., 2006).

[17] Constitutional courts have been defined as "permanent constitution-makers" by L. PEGORARO, LINEAMENTI DI GIUSTIZIA COSTITUZIONALE COMPARATA 128 (1998).

Such a deep analysis, however, would exceed the limits of this essay. Our goal is not to provide an overambitious new theory of constituent power, but more modestly to propose only a possible hint as to the interconnection between the changing function of constitution-building and the hermeneutical role of comparative law. To this end, the following pages will focus on some telling examples of the dissemination of the procedural model in constitution-making and constitution-building (due both to comparative authority and to international imposition) (III.1. and III.2.). To verify the hypothesis according to which the procedural and thus comparative method in constitution-building has become inherent in today's constitutionalism, some "negative" examples of a return to a merely political constitution-making will also be discussed (IV.). Finally, some tentative, comparative conclusions will be drawn from the aforementioned cases, arguing that the comparative method is becoming the backbone of contemporary constitution-building (V.). A method that, being increasingly and capillary diffused, becomes a comparative model.

III. *The procedural model: selected case studies*

The evolution from merely political constitution-making, typical of the *bourgeoise* revolution, to a more complex constitution-making process is well known in legal analysis.[18] In other words, it is commonly accepted that in complex and pluralistic societies constitution-making and constitution-building are the product of complex and pluralistic processes that necessarily include different actors. The

[18] See The Paradox of Constitutionalism: Constituent Power and Constitutional Form (M. Loughlin & N. Walzer eds., 2007); J. Elster, Constitutionalism in Eastern Europe, cit., L. Mezzetti, Teoria e prassi delle transizioni costituzionali 275 ss (2003); Constitutionalism in Africa. Creating opportunities, Facing Challenges (J. Oloka Onyango ed., 2001); R. Sacco, *Il costituzionalismo africano*, Diritto pubblico comparato ed europeo 3 ss. (2000); G. de Vergottini, Le transizioni costituzionali 131 ss (1998); F. Venter, *The Emergence of Constitutionalism in Southern Africa in the late XX century, in* International Conference on African Constitutions 11 ss (V. Piergigli & I. Taddia eds., 1998); R. Sacco, M. Guadagni, R. Aluffi Beck-Pecoz & L. Castellani, Il diritto africano (1996); P. F. Gonidec, *Le constitutionnalisme africain*, Revue Juridique et politique indépendance et coopération 23 ss (1996); Id., Les systèmes politiques africains (1996). For an empirical research of the genetic phase of the African State during decolonisation see D. M. Lavroff, Les systèmes constitutionnels en Afrique noire. Les Etats Francophones (1976) and A. Cabanis & M. L. Martin, Les Constitutions d'Afrique francophone. Évolutions récentes (1999). See also V. T. Le Vine, *The Fall and Rise of Constitutionalism in Africa*, 35 (2) The Journal of Modern African Studies 181 ss (1997) and A. Bourgi, *L'évolution du constitutionnalisme en Afrique: du formalisme à l'effectivité*, 52 Revue française de droit constitutionnel 721 ss (2002).

purpose of this paper is to demonstrate first, that more recent constitutional transitions also made a further step in this regard, moving from constitution-making *processes* to constitution-making (and constitution-building) *procedures* and, second, that this further evolution has been deeply influenced by the comparative method. The slow but constant evolution of "mere" processes into legally defined procedures means that these processes are gradually assisted by more (and more sophisticated) legal guarantees.

To show this evolution, we discuss three sets of comparatively relevant examples of recent procedural constitution-building: On the one hand, the establishment of pluralistic arenas as well as multi-phase constitution-making processes (1.) and recent internationally imposed constitutions (2.) prove evidence that there is a growing consensus towards pluralism, comparativization and proceduralization of constitution-building. On the other hand, the failure of the opposite approach, i.e. apparently political-only constitution-making processes demonstrates that this can no longer be the time for a simplistic, monistic constitution-making taking place outside of predetermined legal guarantees (IV.).

1. *Pluralistic arenas and multi-phase constitution-building: Constitutional forums, multiparty negotiations, Round Table Talks. The cases of South Africa, Namibia and Poland*

One of the most visible steps in the shift from the classical, political-only constitution-making (constitutional assemblies and alike) to a more complex and pluralistic constitutional process and, in the end, constitutional procedure, is the establishment of new types of decision-making *forums*, such as the so-called *Round Table Talks* or *Multi-Party Negotiations*.[19]

This new type of (no longer merely political but not yet fully procedural) constitution-making spread out in the eve of the post-1989 constitutional transition. Important European examples are the cases of Bulgaria, Hungary, Poland, Czechoslovakia and East Germany.[20] In Africa, the experience of multi-party negotiations during the constitutional transitions in Namibia and South African should be mentioned. All these forums became the (new) political space where, generally without democratic legitimation, fundamental decisions were made on radical amendments to the old constitutions or general agreements were reached on new constitutional texts. Moreover, in several cases the forums made it possible to reach a compromise on the subsequent constitution-making process,

[19] See P. Paczolay, Constitutional Transition and Legal Continuity, 8 Connecticut Journal of International Law 559, 560 ss (1993).

[20] See J. Elster, *supra* note 18, 455; R. Ludwikowski, *Mixed Constitutions Product of an East-Central European Constitutional Melting Pot*, 16 Boston University International Law Journal 1 ss (1998).

allowing a sort of negotiated constitution-making procedure, thus submitting the further constituent steps to legal rules.[21]

The most relevant and better known example in this regard is certainly South Africa, whose constitution-making (and subsequently constitution-building) represents one of the most complex processes that ever took place, and might therefore serve as a comparative model. Even though the final democratic constitution of 1996 was formally adopted by the Parliament meeting as constitutional assembly, many fundamental decisions have been negotiated long before the establishment of the constitutional assembly. A number of multi-party forums, such as the Conference for Democratic South Africa (Codesa I and II), as well as the multi-party negotiating process (MPNP), took place even before the first democratic election in 1994. These forums, composed by delegates of the *de facto* constituent actors (political parties, liberation movements and organisations) reached an agreement on a number of constitution-making steps, such as the 1993 Interim Constitution, the establishment of a Constitutional Court, and the 34 fundamental constitutional principles that were guiding (and binding for) the subsequently elected constitutional assembly. The Constitutional Court has been vested with the power to verify and formally certify that the final Constitution was in line with the 34 fundamental constitutional principles.[22] It is worth noting that such a control was carefully carried out by the Constitutional Court. The judges, in fact, refused to certify the first constitutional text and forced the constitutional assembly to re-write some sections of the final Constitution based on the 34 principles.[23] The South-African experience is a clear example of the mentioned fragmentation of the constitution-making process (multi-step elaboration of the Constitution by limiting the previously exclusive power of a political body) as well as of its gradual transformation into a constitution-making procedure.

Even before the South African experience, an analogous constitution-making procedure has been experimented with in the same geopolitical area during the constitutional transition in Namibia. The South African apartheid regime, having the administrative control over the territory of today's Namibia, negotiated the

[21] A. Arato, Forms of Constitution Making and Theory of Democracy, 17 Cardozo Law Review 191, 230 (1995).

[22] S. Gloppen, South Africa: the Battle Over the Constitution (1997); H. Ebrahim, The Soul of a Nation. Constitution Making in South Africa (1998); R. Spitz & M. Chaskalson, The Politics of Transition. A Hidden History of South Africa's Negotiated Settlement (2000); P. Strand, Decisions on Democracy. The Politics of Constitution – Making in South Africa 1990–1996 (2000); H. Klug, Constitution Democracy. Law, Globalism and South Africa's Political Reconstruction (2000).

[23] M. Chaskalson & D. Davis, Constitutionalism, the Rule of Law and the First Certification Judgment, 13 (3) South African Journal on Human Rights 430 ss (1997).

political transition and partly also the content of the new Constitution with the former Namibian liberation movements (*South West Africa People's Organisation* – Swapo) and with international actors: the UN, Canada, the US, Germany, France and the United Kingdom.[24] These countries (the so-called "Western Contact Group") started a multilateral negotiation with the South African government and the liberation movements in 1982, under the supervision of the UN. The result of such a multilateral negotiation led to the approval of a number of fundamental constitutional principles which had to be imperatively introduced in the Constitution. The procedural character of the Namibian constitution-making process was already laid down in UN Resolution no. 435/1978, through which the Security Council established a procedural path in order to reach and maintain peace between the parties and to conduct further constitutional negotiations. The 1982 principles crystallised some fundamental constitutional decisions, such as the elaboration of a Bill of Rights, the establishment of a constitutional Court, the safeguarding of property rights, preservation of judicial independence, and the guarantee of a multiparty political system.

The cases of South Africa and Namibia clearly demonstrate that procedural constitution-making (and constitution-building) can accommodate diverse and to some extent conflicting internal and external constraints and thus perfectly fits in the "comparativization" of solutions and procedures that marks the present era.

Another interesting example in this regard comes from the Polish constitutional transition, which lasted eight years. In a very unstable political context, the 1989 Round Table Talks (RTT) made it possible to reach agreements on the rules to be applied to the first semi-free elections and to negotiate some major amendments to the 1952 socialist Constitution. After that, a set of profound constitutional amendments was passed by the new *Sejm* in April and December 1989 in order to address the economical and political challenges posed by the transition from a communist to a liberal regime. Most of the *interim* constitutional amendments foreshadowed the new constitutional framework that was adopted only in 1997.[25] In particular, the "December amendments" changed the country's name from Polish People's Republic into Republic of Poland, abolished

[24] M. G. Erasmus, *The Impact of the Namibian Constitution on the nature of the State, its Politics and Society: the Record after ten years, in* The Constitution at Work. 10 Years of Namibian Nationhood 6 (M. Hinz, S. K. Amoo & D. Van Wyk ed., 2000); M. Wiechers, *Namibia: the 1982 Constitutional Principles and their Legal Significance, in* Ibid., 1 ss; J. Dugard, The South Africa/Namibia Dispute (1973); D. Van Wyk, *The Making of Namibian Constitution: Lessons for Africa*, 24 CILSA 341 ss (1991); G. J. Naldi, Constitutional Rights in Namibia (1995).

[25] M. Brzezinski, The Struggle for Constitutionalism in Poland (1998); D. H. Cole, *Poland's 1997 Constitution in Its Historical Context*, 1 St. Louise-Warsaw Transatlantic

the provisions on the leading role of the "Party", eliminated the clauses on the socialist economy, cancelled the constitutional mandate of political and military alliance with the Soviet Union and introduced forms of private ownership by providing the constitutional basis for a new market economy. Alongside the 1990 economic reforms, these amendments allowed Poland to start a deep post-socialist transformation.[26] Due to a political stalemate, in 1992 another substantial constitutional revision had to be approved. The so-called 1992 "Small Constitution" provided a deep change in the state power structure, aiming to achieve a more balanced relationship between the states powers. In 1992, President Walesa tried to introduce a "Charter of Rights and Freedoms" integrating the Small Constitution. However, the sudden dissolution of the *Sejm* by Walesa himself and the call for new elections made it impossible to adopt the Charter as the new Polish Bill of Rights.

As Mark Brzezinski pointed out, the organs constituted in previous regime such as the Ombudsman and the Constitutional Tribunal played a fundamental role during the constitutional transition. In particular the Constitutional Tribunal has been "instilling normative characteristics into Polish constitutionalism and developing constitutional doctrine in accordance with its understanding of the supra-positive principles of a state ruled by law".[27] In several judgements from 1990 onwards, the Constitutional Tribunal established progressively "independency of the judicial review as a fundamental character of Polish constitutionalism", enforced transitional clauses on separation of powers "preventing [for example] the *Sejm* from delegating to the President the power to remove regular court judges for political reasons",[28] reinforcing the *Rechtsstaat* clause of the Constitution (as amended in December 1989). The eight years constitution writing process came to an end in April 1997, when the National Assembly approved the draft Constitution. The Constitution was successively ratified by a popular referendum.

The trend of the proceduralised constitution-building process is partly visible in some other post-socialist constitutional transitions. Here the phenomenon of the RTTs needs to be taken into closer consideration.

Generally the RTTs were organs enabled to start the constitutional negotiation between the "former enemies". They made it possible to take two types of

Law Journal, 1 ss (1998); M. Wyrzykowski, *Le riforme costituzionali in Polonia*, 3 Quaderni Costituzionali 386 ss (1992).

[26] R. Ludwikowski, Constitutional Culture of the New East-Central European Democracies, 29 Georgia Journal of International and Comparative Law 1, 2 ss (2000).

[27] Brzezinski, *supra* note 25, 158.

[28] *Ibidem*, 163. J. Elster, *Constitution Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, *in* Il futuro della Costituzione 209 ss (G. Zagrebelsky, P. P. Portinaro & J. Luther eds., 1996).

constitutional decisions: (a) the establishment of new electoral laws, which in many circumstances deeply influenced the creation of the following constitutional assembly; (b) the revision of a large number of articles of the socialist constitutions. In many cases these revisions survived the following constitution-making processes, being incorporated into the new "democratic" texts.

It must be pointed out that the RTTs took place before the formal establishment of the constitutional assembly, thus widening the timing and the type of the decision-making procedure of the new constitutions. Essentially the RTT model has been widely experimented with in Poland, Bulgaria, Hungary, Czechoslovakia and East Germany.[29] It is important to note that fragmented constitution-making *procedures* have been a useful tool in order to come to terms with complicated political impasses. In particular, when agreements among different constituent actors have to be reached, the multiple-step procedure has generally been successful in establishing a convergence between originally antithetic positions: giving up radical positions and being ready for compromise (the foundations of constitution-making processes) often requires postponing critical decisions.

Two main comparative lessons can be learned from the mentioned examples. Firstly, the RTTs cannot be fully understood as isolated experiences. Both in Africa and in Central-Eastern Europe, there has undoubtedly been a circulation of comparative models. "Domino" effects, "imitation", as well as a largely similar configuration of the political transitions requiring to be dealt with throughout negotiated constitutional agreements, underscore common constitutional law trends. Secondly, several analogies can also be observed with regard to the content of the agreements provided by the RTTs: in all cases the outcome was an entrenched constitution, a guaranteed bill of rights and a broad judicial review, and this was also due to the fact that in all mentioned cases a deep comparative analysis was carried out with respect to both the procedural and the substantial aspect of constitution-making.

2. *New imposed constitutionalism and the model of transitional justice*

Another important factor common to several contemporary constitutional transitions is the phenomenon of *new imposed constitutionalism*. In the past decades, scholars elaborated the notion of *imposed constitutionalism*.[30] This was essentially referred to the German and Japanese constitution-making (and constitution-building) processes after WWII because of the massive involvement of allied forces in the decision-making on the new constitutional order. In the following years, the notion of imposed constitutionalism has been largely used in order

[29] See J. Elster, *supra* note 18, 455 ss.

[30] See N. Feldman, *Imposed Constitutionalism*, 37 Connecticut Law Review 857 ss (2005).

to describe the post-colonial constitution-making in Africa, where a direct or indirect involvement of the former colonial states in drafting post-colonial constitutional texts took place.[31]

Today the phenomenon of imposed constitutionalism is slightly changing. As in the past, some constitutional transitions take place after violent conflicts. But in more recent times, several transitions are being "guided" and "mediated" by the international organisations, through the involvement of foreign *puissances* or NGOs. Looking at the involvement of international organisations, the consequences of the intervention in post-conflict reconfiguration of the constitutional systems are different than in the past. The cases of Bosnia,[32] Kosovo,[33] East Timor,[34] Cambodia and Sierra Leone[35] are evocative examples of this trend. Interim or permanent constitutions of these countries have been drafted in post-conflict arenas under the formal control of UN-supported international peace-keeping and peace-building interventions. Military and political actors such as NATO, the United Nations, international NGOs as well as single foreign states exercised pressure, imposed time frames, and delivered technical and financial support in order to produce new constitutions.

The direct influence of international constitutional models, patterns and standards has been remarkable in shaping the way to deal with the so called *transitional justice*,[36] in organizing the constitution-making (and constitution-building) process itself, as well as in introducing international standards and models of organisation of state powers, thus intensively using the comparative method. In particular, as to the international role in establishing a transitional justice process, in all the mentioned countries the transitional agreements, the interim constitutional drafts, and the final constitutions embodied different forms of transitional retributive justice models. In particular, so-called "mixed tribunals" (composed by international judges appointed by the UN and selected national

[31] Ibid.

[32] J. Woelk, *Federalism and Consociationalism as Tools for State Reconstruction? The Case of Bosnia and Herzegovina*, in Federalism, Subnational Constitutions, and Minority Rights 177 ss (A. Tarr. R. Williams & J. Marko eds., 2004). See also J. Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance* (No. 7/2004), *at* <www.eurac.edu/edap>.

[33] Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren? (J. Marko ed., 1999).

[34] R. Garrison, The Role of Constitution-Building Processes in Democratisation. Case Study: East Timor, International Institute for Democracy and Electoral Assistance (2005).

[35] A. Adebaid, Building Peace in West Africa: Liberia, Sierra Leone and Guinea Bissau (2002); A. Bundu, Democracy by Force? A Study of International Military Intervention in the Civil War in Sierra Leone from 1991–2000 (2001).

[36] See for the concept L. Bickford, *Transitional Justice, in* The Encyclopedia of Genocide and Crimes Against Humanity (vol. 3) 1045 ss (D. Shelton ed., 2004).

judges)[37] have been established in the mentioned countries, although each tribunal or special court adopted different structures and procedures. Common elements, however, are the mixed composition and the retributive approach, enforcing the international principle of the "duty to prosecute" international crimes.[38] Whereas in many transitional experiences alternative models of conflict resolution (such as the Truth Commissions models) have been experimented with, in post-conflict areas that experienced a UN intervention retributive systems have been chosen:[39] Even if in East Timor and Sierra Leone Truth Commissions have been established together with the UN-sponsored special courts, the retributive system has been dominant.

By dealing with the crimes committed by previous regimes and by enforcing judicial machineries of truth recovery, sensitive political and social elements such as the notion of collective memory of the past can be influenced deeply. The "truth" and the "memory" of the past become, inevitably, the substantial platform on which the new democratic constitutional systems can be created. In this perspective, transitional justice is also perceived as a "tool" for the de-legitimisation of former criminal governments, oligarchies and political forces

[37] A. Lollini, *La giustizia di transizione: il principio del duty to prosecute come una nuova variabile di eterodeterminazione dei processi costituenti?, in* Guerre e minoranze 323 ss (G. Gozzi & F. Martelli eds., 2004).

[38] New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone & Cambodia (K. Ambos & O. Mohamed eds., 2003); D. Boyle, *Quelle justice pour les Khmers rouges?*, 40 Revue trimestrielle des droits de l'homme 773 (1999); S. Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 Criminal Law Forum 185 (2001); D. Boyle, *Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes, in* Yearbook of International Humanitarian Law, Vol. V, 167 ss (A. McDonald ed., 2002); A. J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice, in* Post-Conflict Justice 635 (C. Bassiouni ed., 2002); M. J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo, in* Id., 523; H. Strohmeyer, *Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor*, 95 American Journal of International Law 46 (2001); Id., *Building a New Judiciary for East Timor. Challenges of a Fledgling Nation*, 11 Criminal Law Forum 259 (2000). See also Transitional Justice. How Emerging Democracies Reckon with Former Regimes (N. J. Kritz ed., 1995); J. Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of a New Democracies Confrontating Past Human Rights Violations*, Hastings Law Journal 1425 (1992); R. Siegel, *Transitional Justice: A Decade of Debate and Experience*, in: 20 Human Rights Quarterly 433 (1998); L. Huyse, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past, in* International Criminal Law and procedure 51 (J. Dugart & J. Van Wyngaert eds., 1999); M. Smiley, *Democratic Justice in Transition*, 99 Michigan Law Review 1332 (2000).

[39] See for example *Agreement Between the United Nations and Royal Government of Cambodia Concerning the Prosecutions under Cambodian Law of Crimes Committed During the Period of Democratic Kampuches*, June 2003; Matheson, *supra* note 38, 523; A. J. M. Mc Donald, *Sierra Leone's Uneasy Peace: The Amnesties Granted in the Lomé Peace Agreement and the United Nation's Dilemma*, 13 Humanitäres Völkerrecht 11 (2000).

responsible for the conflicts. In other words, transitional justice is perceived as a key element of the post-conflict constitutional transitions. Its enforcement implies (a) the control over the solidification of some "material" elements of the post-conflict democracies; (b) the reconfiguration of the unity of political bodies fragmented by the previous conflicts; and (c) the de-legitimisation of former political forces and the contextual legitimisation of new ones. It thus seems fair to say that through the "imposition" of transitional justice retributive systems, a new "soft" form of "imposed" constitutionalism is implemented.

"Alien" influence on constitution-making processes has taken place, in the last decade, throughout more "classical" expedients. Over the last decade, external influence on constitution-making processes has often been exercised with the assistance of internationally controlled transitional authorities, such as in Kosovo,[40] in East Timor and in Cambodia. International forces sponsored more or less representative political bodies empowered to draft the new constitutions (generally under tight time constrains), largely inspired constitutional structures and substantial rights as well as administrative transitional body ruled by (or with considerable assistance of) international organisations.

The case of Timor is an evocative example of this international influence over the constitution-making process. When Indonesia left East Timor after the victory of independentist forces in the 1999 referendum, Indonesian militias were responsible for horrible crimes following the atrocities committed during the years of Indonesian control over Timor. With Security Council Resolution no. 1272, the UN decided to establish the United Nation Transitional Administration in East Timor (UNTAET). Despite of the concrete need for international intervention due to the dramatic situation of the country after the departure of Indonesian forces, the UN mission assumed the formal and practical control of a peace-keeping intervention, thus marginalizing autochthons organisations, despite of the presence of East Timorese organised political forces (such as the *Concelho*

[40] When Kosovo authorities unilaterally declared independence in February 2008, the process for the adoption of the new Constitution was particularly speedy and at first glance it was conducted without international involvement: a constitutional commission was formed, the text was drafted in less than two months, was subsequently approved by the Assembly and promulgated by the President and it entered into force on June 15, 2008. However, the case of Kosovo is an outstanding example of the modern trend of constitution-making processes based on international and comparative guidance. In fact, the constitution was largely based (particularly on issues such as the protection of minority rights) on the international plan known as "Ahtisaari plan" (after the name of the Special Envoy of the UN Secretary-General on Kosovo's future status) as well as on the Constitutional Framework adopted by the UN mission (UNMIK) in 2001, and so was the composition of the constitutional commission. Moreover, the Constitution was certified in April 2008 by the International Civilian Representative. Finally, the procedure for the adoption of the Constitution after the unilateral declaration of independence was just the final stage of a much longer process that *de facto* begun when Kosovo was put under UN administration in 1999.

Nacional da Resistancia Timorense) that were ready to cooperate in the constitution-building process. The reason was that in peace-keeping operations the UN had to be careful not to side with any of the "factions" until the establishment of political structures that were acceptable to "both" sides. The problem was that the "side" responsible for the conflict was not in the country anymore. As a consequence, until the establishment of the Constitutional Assembly in August 2001, all National Consultative Councils were under control of the UNTAET (and its Chairman Sergio Vieira Mello) and vested with very limited powers of intervention and with no veto power over UNTAET decisions.[41] In this context the timetable for the constitution-making process in East Timor had to be decided under UN control and within a very tight deadline. The constitution had to be drafted by the Constitutional Assembly within 90 days from its election. More "progressive" and articulated constitution-making processes, based on idea of interim constitutions with middle term power-shared government proposed by the NGO Forum, were rejected.

The Constitutional Assembly elections produced a clear victory of the *Fretilin* Party. The Assembly immediately started the drafting procedure and public consultation process. The original timetable was ultimately extended by the Constitutional Assembly to seven months. Only 15 months elapsed from the debate on the timetable to the adoption of the Constitution by the Constitutional Assembly in March 2002. The Constitution was finally approved on March 22, 2002.

IV. *Back to simplification and constitutional failures: the EU, Afghanistan and Iraq*

In contemporary constitutionalism one can observe the spreading of a procedural method in constitution-making and constitution-building. As the mentioned examples show, the shift towards such a procedural way for the adoption of new constitutions is largely conditioned by comparative imitation and international imposition. It might thus be argued that procedural rules comply better with the requirement of pluralism, which is the core of contemporary constitutionalism. In simple words, a procedural constitution-building seems to better accommodate the fundamental constitutional requirement of pluralism in the process of drafting a new constitution.

This seems to be confirmed *a contrariis* by three recent examples where to some extent a more traditional process of constitution-building has been tried, with rather unsatisfactory results. Provocatively, the experiences of the EU, of

[41] See Garrison, *supra* note 34, 11; L. Appicciafuoco, *Timor Est: processo costituente e transizione verso la democrazia*, Diritto pubblico comparato ed Europeo, Vol. II, 516 (2002).

Afghanistan and of Iraq will be analysed together albeit the immense difference among them, because in all these cases the attempt was made to elaborate a constitution by means of a "less procedural" process. Of course, to a great extent all three constitution-making processes can and must be seen as a long-run process; especially the case of the EU that represents *the* landmark example of a constitution-building through stratification of constitutional moments and fragmentation of the constitution-making process. However, the unsuccessful last step, the failure of the attempt to reach a "constitutional big bang" by means of the Treaty establishing a constitution for Europe (and to some extent even the stalemate provoked by the Irish "no" to its "light" successor, the Lisbon Treaty), seems to be evidence that this last step was not in line with the pluralistic, comparative and procedural process that marked the constitutional evolution of the EU until then, thus failing due to an excessive simplification that modern constitutionalism can no longer accept.

The provocative joint analysis of the constitutional processes in the EU, in Afghanistan and in Iraq seems to confirm our hypothesis for two main reasons. First, all these recent cases can not be labelled as only political constitution-making processes. On the contrary, they all present a large set of elements that are common to the modern constitutional processes: plural legitimacy (at least compared to previous regimes), multi-phase constitution-making, a certain degree of proceduralization in drafting and in adopting the text. All this testifies that these elements are unavoidable in contemporary processes of constitution-making. Second, even if constitution-making was somehow successful in all cases, the constitution-building failed. Among the reasons for that, the excessive stress of the political, sovereignty-oriented constitutional process might also have played a role, showing that the nostalgia for simplistic processes of constitution adoption might be counter-productive.

1. *The European Union: A Permanent Constitution-Building?*

The issue of the constitutionalization of the EU is the source of a never-ending debate among lawyers. Supporters of a more formalistic view, according to which the EU is still an international organization regulated by "normal" international treaties, tend to deny the possible existence of a European constitution, due to the lack of the formal and substantial elements of a constitution: people and sovereignty. Supporters of a substantive view, on the contrary, maintain that the EU already has a constitution in functional terms. The two approaches are mirrored in two well known judicial decisions: the so called *Maastricht*-decision of the German federal constitutional court[42] and the *Les Verts* case of the European Court of Justice (ECJ).[43] In any event, it is undisputed that the EU has a constitutional law even without a formal constitution, and that the relationship between domestic and European law needs to be read in constitutional terms.

[42] BVerfGE 89, 155 (1993). The court expressly pointed out that without a State there cannot be a constitution, and without a people there cannot be a State.

For the purposes of this essay, suffice here to say that the EU constitution-building process is perhaps the most significant and self-evident demonstration of the points to be made. First, constitution-building is clearly separated from any sort of state and nation-building. Second, it is being realized through a series of (legally and logically) connected acts and facts of constitutional relevance[44] over a long period of time. The interconnection of all these many constitutional moments make it impossible to tell when the constitutionalization has started and whether it has ended, and this gives rise to endless debates between those who support the idea that a constitution has already been established and those who support the opposite view. Third, this process is creating a stratification of constitutionally relevant acts (particularly through the case-law of the courts) which functionally substitute formal moments of constitutional "big-bang". Fourth, and more important for our purposes, the evolution of EU constitutional law is intimately linked to the comparative method. It can be argued that EU constitutional law is nothing but comparative constitutional law, as implicitly or explicitly affirmed first by the ECJ (elaborating the very comparative concept of the common constitutional traditions),[45] and subsequently also in the Treaties:

[43] ECJ, 23–4–1986, case 294/83, *Parti ecologiste "Les Verts"*, ECR, 1339, where the court defined the European Community as "a community based on the rule of law, inasmuch as neither its member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the *basic constitutional charter, the Treaty*" (at 23, emphasis added).

[44] Besides the founding treaties, in the last two decades there has been a spill-over of constitutional documents, adopted at an ever closer time distance: from the Single European Act (1986) to the treaties of Maastricht (1992), Amsterdam (1997) and Nice (2000), the Charter of fundamental rights of the EU (2000) the Treaty establishing a Constitution for Europe (2004) and the Lisbon Treaty (2007). These constitutional developments have been followed by significant constitutional amendments in almost all Member States.

[45] Beginning with the landmark fundamental rights decisions in *Stauder v. City of Ulm* (ECJ, 12–11–1969, case C-29/69, ECR, 419) and *Internationale Handelsgesellschaft* (ECJ, 17–12–1970, case C-11/70, ECR, 1125), For a clear exposition of the reasoning see ECJ, 21–9–1989, joined cases 46/87 and 227/88, *Hoechst AG v. Commission*, ECR 2859. As to other fields of law where the ECJ has drawn comparative inspiration on the common constitutional traditions see among others the following leading cases: ECJ, 14–12–1965, *Morina v. Parliament*, case 11/65, ECR 1357, ECJ, 17–5–1973, *Pericolo v. Council*, case 58, 75/72, ECR, 511, ECJ 13–2–1979, *Granaria*, case 101/78, ECR 623, ECJ, 28.4.1979, *Lütticke v. Commission*, case 4/69, ECR 339, ECJ, 15–6–1976, *Mills*, case 110/75, ECJ 977, ECJ, 7–6–1972, *Sabbatini*, case 20/71, ECR 345, ECJ, 7–6–1972, *Bauduin*, case 32/71, ECR 363, ECJ, 30–1–1974, *Louwage*, case 148/73, ECR 81, ECJ, 12–7–1957, *Algéra*, case 7/56, ECR 83, ECJ, 4–7–1963, *Alvis*, case 32/62, ECR 107, ECJ, 3–3–1971, *Riva*, case 2/70, ECR 97, ECJ, 24–10–1973, *Balkan-Import-Export*, case 5/73, ECR 1091.

in particular, article 6.2 of the Treaty establishing the European Union (TEU) recognizes the international and comparative method of the constitution-building in the EU, by stating that the Union, founded on principles that are common to the Member States (art. 6.1. TEU), shall draw its protection of fundamental rights from the European Convention on Human Rights and other international instruments as well as "from the constitutional traditions common to the Member States, as general principles of Community law".

A recent attempt to unify the constitutional documents by (trying to) establish a clearer constitutional "big-bang" through the adoption of the constitutional treaty (Treaty establishing a Constitution for Europe) has failed after its rejection by the voters in France and the Netherlands in 2005, regardless of the fact that it has been drafted by a pluralistic body, the Convention for the future of Europe (which was at least much more pluralistic than the Inter-Governmental Conference, the ordinary Treaty-amending organ). Following the debacle of the constitutional treaty, a new and less ambitious attempt was made in order to merge the existing treaties, to adopt the Charter of Fundamental Rights and to give legal personality to the EU, by means of the Lisbon Treaty, adopted in December 2007 and carefully avoiding the term "constitution". Nevertheless, and regardless of its ratification by the vast majority of the Member States, the ratification Treaty has not been approved in the referendum held in Ireland in June 2008.[46]

This seems to confirm that constitution-building in the European Union is an intimately pluralistic phenomenon[47] that cannot stand an excess of simplification (particularly coming to the fore in referendums on the ratification) and top-down, political imposition. The comparative nature of the process requires a degree of complexity (in terms of procedures, time-frames, involved actors) that cannot be reduced to a traditional, simplistic process of approval. At least for the time being, constitution-building in the EU will have to remain a pluralistic, procedural, step-by step, multi-layered process. The case of the EU is, of course, an extreme example of the new, comparative method in constitution-building, but precisely for this reason it is particularly telling with regards to contemporary trends and evolutions. If our hypothesis is correct, the attempt to make a political, final step in the constitution-making process, represented by the adoption of the constitutional treaty, has failed not because of the lack of the political momentum but rather due to the opposite reason: too much

[46] Amendments to the Treaties require ratification by all Member States. On the ratification procedures see THE EUROPEAN CONSTITUTION AND NATIONAL CONSTITUTIONS: RATIFICATIONS AND BEYOND (A. Albi & J. Ziller eds., 2007).

[47] See on that also M. Dani & F. Palermo, *Towards An Ever More Complex Union: An Epilogue*, *in* AN EVER MORE COMPLEX UNION 313 (R. Toniatti, F. Palermo & M. Dani eds., 2004).

of a political step, symbolized by a (quasi)-traditional constitution-making, is not compatible with the most prominent example of modern constitution-building tendencies, consisting in the plurality of actors, a diluted time frame, and complex procedural constraints. In other words, the most recent stages in the European constitution-making process, while largely prepared following the pluralistic openness of contemporary constitutionalism (particularly due to the establishment of two "conventions" that drafted the Charter of Fundamental Rights and the Constitutional Treaty respectively), failed precisely in the moment when pluralism ended: the requirement for an oversimplified, political-only final step in the ratification process impairs the pluralistic and process-oriented foundations of the constitution-making at the European level.

2. *Afghanistan and Iraq: too little attention to the comparative achievements?*

The recent constitution-making processes in Afghanistan and Iraq might serve as additional examples of this trend. As already mentioned, in both cases several key-elements of the contemporary, procedural constitution-making have been followed: the drafting of both constitutions took place in different steps and interim texts were adopted, the legitimacy of the constituent assemblies was much broader than it was during the previous regimes, and the processes that led to the approval of the constitutions were at least to some extent regulated by procedural rules, generally implying democratic elections.

However, in the end of the process the classical, political method emerged, the constitutions were adopted without sufficient involvement of the (political, ethnic, religious) minorities and constitution-building was left to the merely majoritarian, political/electoral process. This might be one of the reasons why the implementation of the recent constitutions is so difficult. Moreover, both constitution-making processes have been carried out in a quasi "mechanical" way, and this raises questions about the awareness of the political bodies about the constitutional *enjeux*.

The post-Taliban constitutional transition in Afghanistan has been divided in some constitutional steps implemented in a short time frame. The extremely problematic political and social situation of the country would have called for a much more articulated procedure, but the constitution-making process has been widely inspired by the "classical" method of constitution writing. The constitution has been perceived as a legal text adopted by a political body (more or less representative) and not as a document drafted through negotiated procedures among different social and political actors. The first Afghan constitutional step has been represented by the "Bonn agreements" signed in December 2001 during the UN-sponsored talks in Germany in which the Northern Alliance commanders also took part, as well as Afghan military factions and Afghan delegates. The agreements established an *Interim Authority* to rule the country

in the aftermath of the military intervention. The Pasthun anti-Taliban leader Hamid Karzai became Chairman of the Interim Authority.[48] The two additional pre-constitutional steps were first made in June 2002, when the *Emergency Loya Jirga* established the *Transitional Authority of Afghanistan*, and second in 2004, when a "fully representative government" was formed after free elections. The agreements also stipulated that the new constitution would be adopted by the *Loya Jirga* (the Grand Council) within 18 months after the establishment of the Interim Authority.

It is important to note that the Bonn agreements provided for a non-elected Constitutional Commission enabled to draft a new constitutional text to be submitted to the *Constitutional Loya Jirga* (CLJ) which was planned to be convened in October 2003. In April 2003, President Karzai appointed the nine members of the Constitutional Drafting Commission as well as 35 members of the Constitutional Review Commission empowered to control the adoption of the new text by the *Constitutional Loya Jirga*.[49] The UN provided all technical and financial support for the whole constitution-making process. In July 2003, President Karzai issued a decree on the convening of the CLJ. That decree stipulated that CLJ would be composed by 500 delegates, 344 of which elected by the district representatives. Fifty delegates had to be appointed by the President of the Loya Jirga. In November 2003, the Constitutional Commission released the final draft of the proposed constitution. In a very short time frame, the last segment of the constitution-making process was started. In December 2003, the *Loya Jirga* was convened in Kabul in order to discuss and ratify the proposed draft. As a "constitutional *fiat lux*" the new text was suddenly presented to the public in early November 2003 by the Constitutional Commission. The *Loya Jirga* ratified the new Constitution on January 4, 2004. The constitution represents a compromise between Islamic hardliners and moderate reformists; the text does not include an explicit reference to the *Sharia* on the assertion that no Afghan law could be contrary to the beliefs and provisions of Islam.

Many commentators noted that the post-Taliban constitutional project is far from being satisfactory, due to a variety of reasons. The extremely problematic social, political and economical background made it difficult to write the new Constitution, and poses enormous difficulties to the effectiveness of the text. However, even if the new constitution-making process has been a remarkable step forward in terms of democratic involvement compared to the five past Afghan

[48] See H. Tavis, *Freedom or Theocracy? Constitutionalism in Afghanistan and Iraq*, 3 Northwestern University Journal of International Human Rights 4 (2005).

[49] C. Schneider, *The International Community and Afghanistan's Constitution*, 7 Peace, Conflict and Development: an Interdisciplinary Journal (2005), *at* <http://www.peacestudiesjournal.org.uk>.

constitutions, many political decisions weakened the idea of finding a constitutional common ground. In this perspective, the adopted constitution-making process, profoundly influenced by international actors and encapsulated within very tight deadlines,[50] was too short and somehow "mechanic", and thus unfit to comply with the complexity of the social, political and religious issues to be addressed. This seems to be confirmed by the fact that, despite UN efforts to set up public consultation processes, most of the rural Afghans never heard of the constitutional process and the new text is totally unknown to them.

The Iraqi constitution-making process has been even more controversial.[51] Like in Afghanistan, the extremely complicated and dramatic political background has been coped with by means of an internationally-run constitutional engineering[52] process that only superficially influenced the Iraqi political body.

In April 2003, in the aftermath of the war, a Coalition Provisional Authority (CPA) was established as a temporary administration for Iraq under the formal control of United States, the United Kingdom and Ireland. The UN Security Council Resolution no. 1483/2003 formalised this *de facto* situation empowering the CPA as administrative authority in the country. Ambassador Paul Bremer war named CPA's Chairman on May 6, 2003. On July 13, 2003, with the consent of the CPA occupying powers, an Iraqi Governing Council (IGC) was established. The Council represented the first step towards the transfer of powers from the international authority to an Iraqi representative institution. After a period of co-administration of the two authorities, in November 2003 an agreement was reached between the CPA and IGC in order to recognise a new transitional administration to take control over Iraq. Furthermore, a few weeks before the agreement, a new UN Security Council Resolution was adopted.[53] The UN Resolution welcomed "the decision of the Governing Council of Iraq to form a preparatory Constitutional Committee to prepare for a Constitutional Conference that will draft a Constitution to embody the aspirations of the Iraqi people and *[urges] it to complete this process quickly*" [emphasis added]. The Iraqi Governing Council, still a non-elected body, promulgated the so-called Transitional Administrative Law (TAL) on March 8, 2004. This text, broadly perceived as an Interim Constitution, was in fact approved by the GCI some weeks before, in February 2004. It lays down several constitutional principles establishing

[50] See Feldman, *supra* note 30, 858.

[51] See M. Lattimer, *Minority Participation and New Constitutional Law*, 12 International Journal on Minority and Group Rights 227, 234 ss (2005).

[52] On the notion of "constitutional engineering" see G. Sartori, Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes (1994); Public International Law & Policy Group and The Century Foundation, *Establishing a Stable Democracy Structure in Iraq: Some Basic Considerations*, 39 New England Law Review, 53 (2004).

[53] UN Security Council Resolution 1511/2003.

that Iraq will be a republican federal democracy (art. 4), that Islam will be the religion of the state (art. 7), and that fundamental rights will be protected (Chapter II, art. 10–23). Article 30 provided for a tight deadline concerning the election of a representative National Assembly (between December 2004 and January 2005), the drafting of a new Constitution, as well as the controversial provision of article 61 concerning the general referendum for its adoption. The most debated provision was that of article 61(d), according to which "the general referendum will be successful and the draft of the Constitution ratified if a majority of the voters approve and if two-thirds of the voters in the three or more governorates do not reject".[54]

Following the general election of January 30, 2005, the newly elected Transitional National Assembly has been empowered, under article 60 of the Transitional Administrative Law, to draft a new constitutional text. The new Transitional Government, chaired by Ibrahim Jaafari, started its office in April 2005. Only five months later, a constitutional draft was submitted to a general referendum and it was eventually approved. Under the new Constitution, in December 2005, general elections were called and a new Parliament was elected.

The recent constitution-making processes in Afghanistan and Iraq were governed by tight deadlines. Like in other post-conflict experiences, the draft constitutions have been written by a relatively small group of people with limited transparency, participation and consensus-building strategies. Consequently, several perplexities arose on the issues of national unity, stability and consensus: an even more serious problem in countries fragmented in ethnic and religious cleavages and perturbed by extremist forces.

Even considering the dramatic political background, the Iraqi and Afghani constitution-making processes may be seen more as a necessity than as an opportunity. Both processes have been started and guided by external time constraints, an overall goal that in the end was prevailing over internal requirements. It is too early to assess the outcomes of both experiences. However, the chosen types of constitution-making seem to be characterised by a sort of "mechanical" approach, typical for classical ideas based on the notion of constituent power exercised by a more or less representative political body in a delimited time.

[54] United States Institute of Peace, Iraq's Constitutional Process: Shaping a Vision for the Country's Future, Special Report no. 132 (Feb. 2005).

V. *Concluding Remarks*

Two main hypotheses are at the heart of this paper. First, recent constitution-making and even more the subsequent constitution-building processes have been and still are undergoing profound changes. Despite their apparently profound differences, the modern constitution-building processes share a common trend towards pluralism, which in legal terms means proceduralization of the adoption of the constitution. Therefore, the very nature of the process of adopting a constitution is becoming a legal phenomenon which can no longer be neglected by the legal analysis. Second, the comparative method plays a twofold role in this trend. On the one hand, it influences procedures and solutions adopted in the course of the most recent constitutional wave; on the other hand, it provides interpretative tools to systematically understand the process of mutual interdependence of constitution-building.

As to the first achievement of the analysis, the development of ever more sophisticated procedures to deal with the creation of a constitution is the consequence of several factors, in particular of the complexity of modern society, of the interconnection of legal solutions and, not least, of the insufficiency of the political process to cope with all these aspects. Therefore, particularly in highly conflictive societies, procedures represent the most reliable guarantee in order to safeguard the involvement of different, sometimes even incompatible actors in the process of the adoption of shared basic rules, by guaranteeing and implementing from the very beginning the basic principle according to which constitution-building cannot be a matter for political majorities and has to include (past, present or future) minorities. Also for international actors, more and more involved (to an obviously different extent) in drafting new constitutions, procedures represent the best guarantee that the new principles are gradually accepted and incorporated by all the social strands. Instead of imposing radical and homogeneous solutions without considering their impact on very different social contexts, the procedural method, together with fragmentation of the constitution-making and its dilution over a relatively long period of time, makes it likely that constitutions can really be "built" (thus accepted by the society) instead of simply "made" (thus often limited to political elites). Again, this is not at all a novelty, but rather an evolution of the rule of law, which to some extent is the rule of procedures. It is the plurality of actors that makes it necessary to adopt legal rules on the adoption of legal rules.

As to the role of the comparative method, it helps identify the ongoing shift from a mere constitution-making (political) process to a more complex constitution-building (pluralistic) procedure. Comparative law is not normative, but rather an interpretative method. It makes visible what the mere analysis of single cases leaves undiscovered. In addition, comparative law is the methodological

foundation that can connect solutions and best practices, and it is therefore *the* interpretative method of today's interconnected world. For the purposes of this paper, it must be emphasized that the best practice comparatively developed regarding constitution-building processes is the process itself, or, rather, the procedure. Precisely because the transplant of substantive solutions has proven to be unsuccessful, it is now the procedure that constitutes the common ground for the circulation of models and best practices.

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